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In the
Supreme Court of the United States

October Term, 1974

No. 74-895

VIRGINIA STATE BOARD OF
PHARMACY, ET AL.,
APPELLANTS,

v.

VIRGINIA CITIZENS CONSUMER COUNCIL,
INC., ET AL.,
APPELLEES.

**Appeal From The United States District Court
For The Eastern District Of Virginia**

BRIEF FOR OSCO DRUG, INC., AMICUS CURIAE, IN SUPPORT OF APPELLEES

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BRIEF FOR OSCO DRUG, INC., AMICUS CURIAE, IN SUPPORT OF APPELLEES

Interest of Amicus Curiae

This *amicus curiae* brief is filed, with the consent of counsel for the parties, by Osco Drug, Inc. ("Osco"), an Illinois corporation, supporting Appellees and urging the Court to affirm the decision of the District Court.

Osco, a wholly-owned subsidiary of Jewel Companies, Inc., a New York corporation, owns and operates more than 200 retail drug stores in 17 states. Since September, 1974, Osco has engaged in a program to advertise its prices for prescription drugs. Pursuant to that program, Osco has published and distributed a pamphlet stating the prices of most prescription drugs, and has advertised in newspapers the availability of the pamphlet and, in some cases, the names and prices of some prescription drugs.

Because of Osco's advertising of prescription drug prices in newspapers in the Boston area, the Massachusetts Board of Registration in Pharmacy ("Mass. Board") has instituted disciplinary proceedings against the pharmacist managers of the drug business of Osco's drug stores in Massachusetts, charging them with violations of Mass. General Laws, c. 94C, §46 and Item 16 of Rule 49 of the Mass. Board's Rules and Regulations, both of which prohibit the advertising of prescription drug prices. These proceedings could result in the revocation or suspension of the registrations of said pharmacists and of the permits to keep open said drug stores.

During the pendency of the proceedings before the Mass. Board, the Massachusetts Public Interest Research Group, Inc. ("PIRG") brought an action against the Mass. Board in the United States District Court for the District of Massachusetts, seeking a declaratory judgment to the effect that said Mass. General Laws, c. 94C, §46 and said Item 16 of Rule 49 are in violation of the First and Fourteenth Amendments. A three-judge Court has been convened to hear the case. Osco has filed an *amicus curiae* brief in support of the plaintiff. ***Massachusetts Public Interest Research Group, Inc., et al.*** **v. *Massachusetts State Board of Registration in Pharmacy, et al.*, C.A. No. 74-5221-C (D. Mass., 1974).**

The proceedings before the Mass. Board and in the *PIRG* case have been stayed until the present case is decided by this Court. Accordingly, Osco has a direct and immediate interest in the instant case, since the decision of this Court will control the decisions in the proceedings in Massachusetts, and will determine the constitutionality of laws and regulations prohibiting the advertising of drug prices in other states where Osco operates drug stores.

Question Presented

Whether the First Amendment is violated by a statute which provides that a pharmacist is guilty of "unprofessional conduct", punishable by revocation of his license, if he advertises the price for any drugs which may be dispensed only by prescription.[1]

Statement of the Case

The District Court held that Va. Code § 54-524.35(3) (1974) is in violation of the First Amendment. The Court distinguished *Patterson Drug Company* v. *Kingery,* 305 F. Supp. 821 (W.D. Va., 1969), holding constitutional the virtually identical predecessor statute, upon the ground that *Patterson* was an action brought by pharmacist sellers of drugs, whereas the present action was brought by consumers of drugs.

The instant case cannot be reconciled with *Patterson.* The decision in *Patterson* does not rest on any lack of standing of pharmacists to attack the statute but on the

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[1] The "question presented" in Appellants' brief (p. 2) assumes the validity of the statute, which we consider to be in issue.

merits. A statute cannot be constitutional when challenged by pharmacists and unconstitutional when challenged by consumers. Moreover, the right to know, upheld in the instant case, cannot be protected unless the correlative right to tell is equally protected.

It is our position that the instant case was correctly decided and that the *Patterson* decision is erroneous.

Summary of Argument

Freedom of speech and of the press are fundamental rights essential to the existence of a free society. Repeated decisions of this Court have protected those rights against invasion by the Federal and State governments, except for speech which is lewd and obscene, profane, libelous or insulting.

"Commercial speech might well be called the stepchild of the first amendment." Developments — Deceptive Advertising, 80 Harv. L. Rev. 1005, 1027 (1967). Undefined and unexplained limitations upon the protection of commercial speech were established by *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). That decision has been widely criticised and questioned in legal periodicals and by members of this Court, and has very recently been clarified in *Bigelow* v. *Commonwealth of Virginia,* 43 U.S.L.W. 4734 (U.S., June 16, 1975).

Commercial advertising serves essential social purposes in affording to consumers information required to make prudent choices among competing products. Such information may be more important to the majority of people than the political and philosophical opinions which traditionally have been more fully protected under the First Amendment.

Pittsburgh Press Co. v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973), seemed to reject

any rigid exclusion of commercial speech from the protection of the Amendment and to require that the validity of any restriction of commercial speech be determined by balancing the First Amendment interests against the governmental interest in regulation. The requirement of balancing such competing interests has now been firmly established by *Bigelow* v. *Commonwealth of Virginia, supra.*

Under such a test in the present case, the First Amendment interests surely prevail. Those interests stem from the great need for information about drug prices in the light of wide variations in such prices, the impact of such price variations and of high drug prices upon the elderly, and the mitigating effect of advertising and consequent free competition upon unreasonably differing and excessive prices. The regulatory interests consist of questionable claims, *inter alia,* that price advertising will increase the use of drugs, that such advertising will encourage consumers to patronize more than one drug store and thus interfere with so-called "monitoring" of patients' drug consumption so as to avoid the use of antagonistic drugs, and that increased competition caused by advertising will encourage small retailers to buy excessive supplies of drugs to obtain quantity discounts and thus result in the deterioration of such drugs on the shelves of pharmacists.

Appellants' reliance upon *North Dakota Pharmacy Ed.* v. *Snyder's Stores,* 414 U.S. 156 (1973), *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955) and *Semler* v. *Dental Examiners,* 294 U.S. 608 (1935) is misplaced. Those cases arose under the Fourteenth Amendment, and no issue under the First Amendment was decided. Moreover, although *Williamson* and *Semler* hold that the Fourteenth Amendment does not prohibit regulation of advertising of prices for professional services in the interest of public health, the statute here involved does not regulate the

professional conduct of pharmacists but only prohibits the advertisement of prices of commodities sold by pharmacists.

Finally, the contention that any First Amendment right to advertise drug prices is inapplicable because alternative means of securing price information are available is without merit, since the existence of alternative means of securing information does not nullify the right to receive such information in another reasonable manner, and the alternative means of securing the desired information are wholly inadequate.

Argument

A. The Virginia Statute Violates the First Amendment.

1. *Scope of the Amendment.*

The freedoms guaranteed by the First Amendment are "secured to all persons by the Fourteenth against abridgement by a state." *Schneider* v. *State,* 308 U.S. 147, 160 (1939) and cases cited. In *Schneider,* the Court stated at page 161:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."

The exercise of such rights has been upheld against restrictive or prohibitory legislation in *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965) (right to receive foreign mailings of "Communist political propaganda" without interference); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963) (right peacefully to assemble and express grievances); *Martin* v. *Struthers,* 319 U.S. 141 (1943) (right to deliver religious handbills to private homes); *Lovell* v. *Griffin,* 303 U.S. 444 (1938) (right to distribute literature without obtaining a license); and *Schneider* v. *State, supra* (right to distribute literature in public streets).

Nevertheless, the protections afforded to freedom of speech and of the press are not absolute. There is no protection for speech which is lewd and obscene, profane, or libelous, nor for "insulting or 'fighting' words." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571-572 (1942). See, also: *Ginzburg* v. *United States,* 383 U.S. 463 (1966); *Stromberg* v. *California,* 283 U.S. 359 (1931); *Gitlow* v. *New York,* 268 U.S. 652 (1925).

2. *Advertising of Drug Prices Is Entitled to First Amendment Protection Even Though Such Advertising Constitutes Commercial Speech.*

The doctrine that commercial speech is entitled only to limited protection under the First Amendment found its origin in *Valentine* v. *Chrestensen, supra.* Chrestensen distributed in the streets of New York City a handbill soliciting visitors to his submarine for an admission fee in violation of an ordinance prohibiting the distribution of "commercial and business advertising matter" upon the public streets. This Court held that the application of the ordinance to Chrestensen's activity did not violate the First Amendment. Reaffirming the doctrine that the gov-

ernment may not unduly burden or proscribe the communication of information and dissemination of opinion in the public streets, the Court held that "the Constitution imposes no such restraint on government as respects purely commercial advertising." 316 U.S. at 54.

Chrestensen has been the subject of much criticism and commentary. One member of this Court has said that the holding was "casual" and "has not survived reflection." Douglas J., concurring in *Cammarano* v. *United States,* 358 U.S. 498, 514 (1959), and dissenting from denial of certiorari in *Dun & Bradstreet* v. *Grove,* 404 U.S. 898, 904-905 (1971). See, also: *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 314-315 (1974) (Brennan, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra,* 413 U.S. at 393 (Burger, C.J., dissenting); *id.* at 398 (Douglas, J., dissenting); *id.* at 401 (Stewart, J., dissenting). It has been noted that in *Chrestensen* the Court did not define the scope of First Amendment protection, if any, given to "purely commercial advertising." Block, Commercial Speech — An End in Sight to Chrestensen?, 23 DePaul L. Rev. 1258, 1263 (1974). Moreover, the reach of the decision has been said to be limited by the circumstance that it involved "regulation that went not to substance, but the manner of distribution", that is, by handbills distributed in the public streets. Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 George Washington L. Rev. 429, 448 (1971).

The basic dogma that commercial advertising is not entitled to the same First Amendment protection that is accorded to political, social and religious advocacy has never been explained by this Court. Developments — Deceptive Advertising, *supra,* 80 Harv. L. Rev. at 1027 (1967). There can be no doubt that such advertising serves essential social purposes both in providing information concerning familiar merchandise and in creating interests in new products. Redish, *op. cit. supra,* 39 George Washington L. Rev. at 432-433. "Advertising is a medium of information and persuasion, providing much of the day-to-day 'education' of the American public and facilitating the flexible allocation of resources necessary to a free enterprise economy." Developments — Deceptive Advertising, *supra,* 80 Harv. L. Rev. at 1027. Through such advertising the consumer is enabled to make a prudent choice among competing products. The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech, 50 Oregon L. Rev. 177, 188 (1971). Indeed, the free flow of economic information may be more important to the majority of people than the unrestricted communication of political, social or commercial opinions. Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191, 1194 (1965).

In *New York Times Co.* v. *Sullivan,* 396 U.S. 254 (1964), this Court held that a paid political advertisement communicating information, expressing opinions and seeking financial support for an important social movement was not a "commercial" advertisement within the meaning of *Chrestensen,* and was entitled to First Amendment protection. The Court stated, at page 266: "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." Similarly, in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952), it was held that motion pictures fall within the Amendment, despite the contention (p. 501) that "their production, distribution, and exhibition is a large-scale business conducted for private profit." See, also: *Ginzburg* v. *United States, supra.* In any event it is now clear that the existence of a profit motive does not deprive speech of First Amendment protection. *Bigelow* v. *Commonwealth of Virginia, supra.*

Prior to *Bigelow,* decisions of the lower Federal courts accorded First Amendment protection to speech "transmitted in a commercial setting or for profit." *Atlanta Coop. News Project* v. *United States Postal Serv.,* 350 F. Supp. 234, 239 (N.D. Ga., 1972) (anticipating *Bigelow,* and holding invalid 18 U.S.C. § 1461 as applied to use of mails for advertisement giving information about procurement of abortions). See, also: *United States* v. *Pellegrino,* 467 F. (2d) 41 (C.A. 9, 1972) (reversing conviction for violation of 18 U.S.C. § 1461 in mailing advertisement of book concerning functions and characteristics of female sexual organs on grounds that advertisement was not obscene and was entitled to First Amendment protection).

3. *First Amendment Interests Should Be Balanced Against Interest in Regulation.*

In *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra,* the Court clarified to some extent the position of commercial speech under the First Amendment. In that case an ordinance declared it unlawful for any employer to discriminate against any person with respect to hiring on account of sex, except for certain exempt jobs, or to publish any advertisement relating to employment, which indicated such discrimination, or for any person to aid in any such act. The Pittsburgh Press was found guilty of violating the ordinance by publishing help-wanted advertisements under captions indicating a sex preference for jobs that were not exempt.

This Court held that the ordinance, as applied, did not violate the First Amendment. Although the opinion characterized the advertisements as "classic examples of commercial speech", the decision rested on the ground that the advertisements encouraged discrimination in employment that was illegal under the ordinance. Thus, the Court

pointed out, at page 388: "Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance." In the present case, no illegal activity is promoted by advertising the retail price of prescription drugs. See *Terry* v. *California State Board of Pharmacy*, No. C-74-1091 RFP (SJ) (N.D. Cal., 1975).

In *Pittsburgh Press,* the Court rejected any notion, derived from *Chrestensen,* that there is an absolute exclusion of "purely commercial advertising" from the protection of the Amendment, and indicated that the extent of the protection of such advertising should be determined, where no illegality is involved, by balancing the First Amendment interests against the governmental interest in regulation. The Court stated at page 389:

> "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."

See Block, *op. cit. supra,* 23 DePaul L. Rev. at 1261.

This balancing technique has been used where traditionally protected areas of speech have been subjected to regulation. In *Schneider* v. *State, supra,* the Court stated, 308 U.S. at 161:

> "In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be

> insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

See, also: *Talley* v. *California,* 362 U.S. 60, 66 (1960) (concurring opinion of Harlan, J.).

Lower Federal courts, both before and after *Pittsburgh Press,* have balanced the opposing considerations in determining the validity of regulations of commercial speech. See *Hiett* v. *United States,* 415 F. (2d) 664 (C.A. 5, 1969) (social importance of information concerning marriage relation prevailed where statute broadly prohibited use of mails for information about securing foreign divorce and soliciting business for that purpose, and legislative purpose was limited to prevention of fraud in procurement of such divorces); *Barrick Realty, Incorporated* v. *City of Gary, Indiana,* 491 F. (2d) 161 (C.A. 7, 1974) (ordinance, designed to prevent "block-busting", prohibiting display of "For Sale" and similar signs on residential property, held valid on ground, among others, that municipal interests in restricting commercial activity in residential areas and in maintaining stable integrated neighborhoods outweighed interests in freedom of speech).

See, also: The First Amendment and Commercial Advertising: *Bigelow* v. *Commonwealth,* 60 Virginia L. Rev. 154 (1974).

The necessity of balancing the opposing interests where commercial advertising is involved has been firmly established by this Court in *Bigelow, supra.* There the Court stated, 43 U.S.L.W. at 4739:

> "Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."

4. *First Amendment Interests Outweigh Governmental Interest in Regulating Advertising of Drug Prices.*

We come now to balance the First Amendment interests in advertising prescription drug prices against the State's interest, if any, in prohibiting such advertising.

a. *First Amendment Interests.*

The Court below found that annual expenditures for prescription drugs are vast, running into billions of dollars.[2] App. 4.[3] The Court also found, as stipulated by the parties, that the prices of identical drugs vary tremendously in Virginia. *Ibid.* Numerous surveys have established that such price differences are usual in other parts of the country. See Rosenthal, *op. cit. supra,* at H1881-H1882; Constitutional Law: A Statute Which Prohibits the Advertising of Prescription Drug Prices Is Unconstitutional,

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[2] "In 1971, for example, the Nation's prescribing practitioners ordered some 1,113,811,000 individual new or refilled prescriptions which consumers purchased in community pharmacies alone in the United States. For these drugs alone, the American public spent an estimated $4,367,381,000." Competitive Problems in the Drug Industry, Select Committee on Small Business, United States Senate, Subcommittee on Monopoly, 92d Cong. 2d Sess. (Nov. 2, 1972), p. 1. See, also: Rosenthal, Congressman Benjamin S., Retail Drug Price Competition, Cong. Rec., House, March 15, 1973, p. H1888; Douglas, The Pharmaceutical Industry and Generic Drugs, Financial Analysts Journal, Sept.-Oct. 1970, p. 113.

[3] The Appendix to Appellants' Jurisdictional Statement is cited as "App."; the Appendix filed with Appellants' brief, as "J.A."

37 Brooklyn L. Rev. 617, 626, n. 73 (1971); *Pennsylvania State Board of Pharmacy* v. *Pastor,* 441 Pa. 186, 272 A. (2d) 487, 494 (1971). Prices for the same drugs have been found to vary among different customers in the same drug store, and to be higher in poorer neighborhoods. Rosenthal, *op. cit. supra,* at H1883.

Such price variations are caused by the consumers' lack of information about drug prices. "The cost to the public of the lack of price competition is enormous." Research Paper and Policy Statement of the United States Department of Justice, etc., J.A. 21, 23.

The principal victims of differentials in drug prices and high drug prices are the elderly, those aged 65 or more. About 80 per cent of the elderly—as compared with 40 per cent of those under 65—suffer from one or more chronic diseases and conditions, many of which can be controlled or alleviated by drugs. In addition to their exceptional need for drugs, the elderly have the least ability to pay for them. See opinion below, App. 3-4; Task Force on Prescription Drugs, Second Interim Report and Recommendations, August 30, 1968, U. S. Department of Health, Education, and Welfare, at 5-7.

The advertising of prescription drug prices will mitigate price variations and, according to the Department of Justice, will result in lower prices. Research Paper, etc., *supra,* J.A., at 21-22. See, also: Prescription Drug Pricing in California—An Analysis of Statutory Causes and Effects, 49 Cal. L. Rev. 340, 347 (1961). Moreover, the advertising of prescription drug prices will afford to the consumer information that will assist him in choosing among competing sellers of drugs. Such information is especially important since the consumer is likely to be ill and elderly and to have an urgent need for the prescribed medicine, and, consequently, may find it difficult to shop for the best price. Retail Drug Advertising Bans are Bad Medicine for Consumers—Is there a Sherman Act Prescription?, 15 Arizona L. Rev. 117, 123 (1973). The poor are often unable to shop because of their lack of mobility and are required to pay the higher prices charged in low income neighborhoods. Rosenthal, *op. cit. supra,* at H1883.

In *Terry* v. *California State Board of Pharmacy, supra,* the Court stated:

> "In weighing the importance of the speech being expressed against the interests advanced by the state in the present case, we begin by observing that the information sought by the plaintiffs, simply the price charged for a given quantity of a given prescription drug, has been stipulated to be health-essential, and may in some cases even be life-essential, insofar as it may increase availability to low-income persons of medically necessary prescription drugs."

b. *Governmental Interests in Regulation.*

The Attorney General of Missouri, declaring invalid a proposed regulation prohibiting the advertising of prescription drugs, stated that "it is difficult to understand how the public welfare can be prejudiced by the dissemination of truthful information concerning the name, nature, and price of drugs which can be purchased only upon proper prescriptions." Fletcher, Market Restraints in the Retail Drug Industry (1961), at 232. Nevertheless, numerous reasons in support of restrictions on such advertising have been advanced with a considerable degree of consistency. See Fletcher, *op. cit. supra,* at 231-239.

It has been argued that the advertising of prescription drug prices would increase the use of such drugs. Research Paper, etc., J.A. 24. The Court below ruled that this contention was "wholly untenable, since the medicine is

controlled by prescriptions of physicians and so the sale of the drugs is not even at the druggists' will." App., p. 9. And in *Pennsylvania State Board of Pharmacy* v. *Pastor, supra,* the Court stated, 272 A. (2d) at 492:

> "Therefore, to urge that allowing price advertisements of prescription drugs would increase the use of such drugs, one must assume either a) that patients are able to pressure doctors into prescribing drugs for them, or b) that pharmacists are willing to risk selling such drugs without a prescription. We think neither assumption valid."

It is usually contended that price advertising encourages price shopping and the consequent patronizing of more than one drug store, and that as a result it may be impossible for a pharmacist to "monitor" the patient's use of drugs by the maintenance of family records and thus enable the patient to avoid allergic reactions and the simultaneous use of antagonistic drugs. Research Paper, etc., J.A. 24. The Court in the *Patterson* case stated that monitoring is "a benefit to the public," although conceding that probably only a minority of pharmacists systematically monitor prescriptions and that "monitoring is not completely effective because of the mobility of customers and the availability of nonprescription drugs which may be antagonistic." *Patterson Drug Company* v. *Kingery, supra,* 305 F.Supp. at 824. *Cf. Supermarkets General Corp.* v. *Sills,* 225 A. (2d) 728, 737 (N.J. Super., 1966).

In the *Pastor* case, the Court, rejecting the argument, pointed out that the state had produced no evidence as to the extent, if any, to which pharmacists monitor prescriptions, and that the courts which have accepted this rationale have conceded that monitoring is "infrequent" and "not completely effective," and stated, 272 A. (2d) at 493:

> "Further, it is primarily the physician's duty to be certain that he is not prescribing drugs antagonistic to those already being taken by his patient. Indeed, it would appear that if the Legislature was in fact concerned about the prescribing of antagonistic drugs, it would have chosen a route more direct than simply prohibiting the advertising of their prices."

See, also: *Maryland Board of Pharmacy* v. *Sav-A-Lot, Inc.,* 311 A. (2d) 242, 247 (Md., 1973).

It was also contended in *Pastor* that the advertising of drug prices "may encourage small retailers to buy unusually large quantities of drugs, so as to obtain a lesser price," and "[a]s a result, drugs may stay on the pharmacist's shelf for an extended period of time during which they may deteriorate." 272 A. (2d) at 491. The Court, noting that in Pennsylvania (as elsewhere) the sale of deteriorated drugs is prohibited, stated, 272 A. (2d) at 494:

> "Nor can it be said that prohibiting advertising of drug prices bears a substantial relation to the third goal asserted—prevention of deterioration of drugs. As in the case of the monitoring function, the means chosen are so far removed from the goal suggested that one must strain to find the relation."

In addition to the foregoing reasons for restrictions on price advertising, a number of equally specious grounds have been urged, allegedly in the interest of the public health. See Fletcher, *op. cit. supra,* at 234-235. All of these reasons lead to the conclusion that the real reason for such restrictions is the suppression of competition. Thus, in *Stadnik* v. *Shell's City, Inc.,* 140 So. (2d) 871 (Fla., 1962), the Court held invalid a Florida regulation prohibiting the advertising of drug prices and stated at page 875:

> "In actuality, the rule [prohibiting advertising] has more resemblance to an economic regulation prohibiting price competition in the prescription drug business than it does to a regulation guarding the public health."

See, also: Retail Drug Advertising Bans, etc., *supra,* 15 Arizona L. Rev. at 125.

Recently the Federal Trade Commission has initiated a proceeding for the promulgation of a trade regulation rule describing as an unfair practice any restriction upon the "disclosure by any retail seller of accurate price information regarding prescription drugs" through "advertisements in print media, broadcast media, or in any other way." Federal Register, Vol. 40, No. 108, pp. 24031 *et seq.*, June 4, 1975. In a supporting statement it is said:

> "The Commission has reason to believe that:
>
> . . . . .
>
> "e. The lack of price information is not vital for any state interest in the public health, safety, and welfare, and the alleged justifications for non-disclosure of price information, such as the alleged possibilities that increased price disclosures may (1) lead to drug abuse, (2) lessen the effectiveness of monitoring by pharmacists to prevent drug interactions, (3) demean the profession of pharmacy, and (4) lead to the dispensing of stale or adulterated drugs, are without significant merit and are outweighed by the probable benefits to consumers from more price information." *Id.* at 24032.

It must be concluded that the social values to be derived from the advertising of prescription drug prices greatly outweigh the dubious governmental interests in prohibiting such advertising. See ***Terry*** **v.** ***California State Board of Pharmacy, supra.***

B. Appellants' Arguments in Support of the Statute Are Without Merit.

Insisting that this is a First Amendment and not a Fourteenth Amendment case (Appellants' brief, p. 4), appellants nevertheless argue on Fourteenth Amendment grounds. Thus they contend, on pages 16-17 of their brief, that the Court below "considered the advertising proscription economically unsound and substituted its wisdom for that of the Virginia legislature", and that its decision is, accordingly, in conflict with *North Dakota Pharmacy Bd.* v. *Snyder's Stores, supra.*

In the economic due process cases this Court refuses to "balance the advantages and disadvantages" of legislation and resolves all doubts in favor of the "rational relation" of the chosen means to the legislative objective. *Williamson* v. *Lee Optical Co., supra,* 348 U.S. at 487, 491 (1955). However, in *North Dakota Pharmacy Bd.,* the Court, quoting from its opinion in *Lincoln Union* v. *Northwestern Co.,* 335 U.S. 525 (1949), made it clear that states may freely legislate in the economic area only "so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." 414 U.S. at 165. See, also: *Ferguson* v. *Skrupa,* 372 U.S. 726, 729 (1963). The Court below based its decision upon the "specific federal constitutional prohibition" of the First Amendment (App. 7), and used the balancing technique which we have discussed. On the other hand, the Court in *Patterson, supra,* erred in its reliance upon the due process cases and its consequent refusal to give any weight to the anti-competitive and other economic effects of the statute. 305 F.Supp. at 825-826.

Appellants argue, on pages 10 *et seq.* of their brief, that the statute before the Court is a regulation "in the interest of public health" and that advertising "in the health field"

may be prohibited in accordance with *Semler* v. *Dental Examiners, supra,* and *Williamson* v. *Lee Optical Co., supra.*

In *Semler* an Oregon statute prohibited dentists, *inter alia,* from "advertising professional superiority", advertising "prices for professional service", or "advertising to guarantee any dental service, or to perform any dental operation painlessly." Holding that the statute did not violate the Fourteenth Amendment, this Court stated, 294 U.S. at 612:

> "The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards from those which are traditional in the market place."

In *Williamson,* the Court held that the Fourteenth Amendment was not violated by the provision of a statute which made it unlawful "to solicit the sale of . . . frames, mountings . . . or any other optical appliances." Reversing the lower Court's decision that this provision was unconstitutional because of its prohibition against soliciting the sale of eyeglass frames, the Court ruled that such frames are not used in isolation but with lenses and, accordingly, may be regulated to the same extent as lenses, which "enter the field of health." 348 U.S. at 490. The Court concluded, *ibid.:*

> "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

Neither in *Semler* nor in *Williamson* was any issue raised under the First Amendment. In *Head* v. *New Mexico Board,*

374 U.S. 424 (1963), the contention that a statute, prohibiting the advertising of prices of eyeglasses, lenses, frames or mountings, constituted an invalid restraint upon freedom of speech was not considered by this Court, since it had not been raised in the State courts nor reserved in the notice of appeal to this Court. 374 U.S. at 433, n. 12. See, also: *Pittsburgh Press, supra,* 413 U.S. at 387, n. 10.

The advertising of prescription drug prices bears only a tenuous relationship to the public health. True, it was stipulated in the District Court that pharmacy is a profession requiring licensing after graduation from an accredited pharmacy school. App. 4. See, also: Fletcher, *op. cit. supra,* at 20-23. However, the statute in the instant case, unlike those in *Semler* and *Williamson,* does not regulate the professional conduct of pharmacists. Thus, the Court stated in *Terry* v. *California State Board of Pharmacy, supra:*

> "It is perhaps appropriate here to state carefully again exactly what is at issue in this case. The plaintiffs seek an injunction against the enforcement of these statutes only insofar as they prohibit price advertising. The plaintiffs are not asserting a right to receive information concerning the quality, effectiveness or capabilities of the drugs, information which tends more directly to promote the product. Thus, the narrow issue before this court is whether low-income consumers of prescription drugs are entitled under the First Amendment to receive information consisting of the retail price at which pharmacies sell prescription drugs."

Cf. Maryland Board of Pharmacy v. *Sav-A-Lot, Inc., supra,* 311 A. (2d) at 249.

Accordingly, it should be concluded that the flimsy nexus

of the present statute to the public health does not justify a prohibition of the advertising of drug prices, even under the Fourteenth Amendment cases.

Appellants argue, on pages 14 *et seq.* of their brief, that consumers have no First Amendment right to receive drug price information "in a *particular manner,*" that is, through advertising, since they can request, but admittedly may be denied, such information on the telephone, or they can go from store to store to secure the information. Stipulation of Facts, ¶¶25 and 28, J.A. 15.

A similar argument was rejected by this Court in *Kleindienst* v. *Mandel,* 408 U.S. 753, 765 (1972), where it was stated:

> "The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches, and because 'technological developments', such as tapes or telephone hook-ups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary here in light of the discussion that follows in Part V—we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access."

More specifically, in *Terry* v. *California State Board of Pharmacy, supra,* it was urged that the First Amendment right to know drug prices through advertising was inappli-

cable because of the existence of alternative means of securing price information as a result of the requirements that drug stores post the prices of the 100 most commonly used drugs and that druggists answer oral and written inquiries about prices. Rejecting this contention, the Court stated:

> "The availability of other alternatives certainly does not extinguish the constitutional interest of plaintiffs in the particular form of access sought. *Kleindienst* v. *Mandel,* 408 U.S. 753, 765 (1972). In other contexts, the court has indicated that the availability of alternative forums for the expression and presumably the receipt of information is wholly irrelevant to a constitutional demand for another reasonable method. *Schneider* v. *Irvington,* 308 U.S. 147, 163 (1939). . . .
>
> "Many of the plaintiffs, users of prescription drugs, are old and infirm, unable to travel to and view posted price posters at a number of pharmacies sufficiently large to provide them with an accurate sample of prices. Evidence in this case indicates that telephone contact is also very time-consuming and costly and not a feasible means of making price information available to an individual consumer. This court finds that by prohibiting media advertising, the most effective means of providing price information to consumers, the challenged statutory scheme significantly and impermissibly restricts the distribution of the information plaintiffs seek, thereby establishing a prima facie violation of the First Amendment."

Conclusion

In this First Amendment case the need for easily accessible information concerning the prices of prescription

drugs outweighs any conceivable regulatory interest in prohibiting the advertising of such prices. Accordingly, it is respectfully submitted that the decision of the District Court should be affirmed, and that the decision in *Patterson Drug Company* v. *Kingery, supra,* should be disapproved.

Respectfully submitted,

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